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In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
PETITIONER,

v.

BRENTWOOD ACADEMY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

TSSAA's member schools have made the collective decision not to use "undue influence" in recruiting students "for athletic purposes." The statewide athletic associations of every state have a similar rule, because it is the consensus judgment of educators (including Brentwood's own headmaster, JA 452) that athletic recruiting at the high school level is harmful and inappropriate. Brentwood and its *amici* try to portray brazen athletic recruiting of vulnerable children as the provision of truthful and accurate "information" about their schools necessary to the exercise of "school choice." But if Brentwood wishes to offer an educational product that includes athletic recruiting, and advertise that product directly to every student in America, it is free to do so. It is not entitled, however, to remain a member of a voluntary membership organization committed to the opposite philosophy, and conscript the other members of that organization into participating in a form of athletic competition they have expressly rejected for themselves.

Brentwood claims to be arguing for "traditional" First Amendment analysis, but its framework is the "traditional" analysis only for speech restrictions in public forums, imposed by the state on unconsenting members of the public, and backed up by coercive sovereign power in the form of criminal or civil penalties. A limitation on speech accepted by participants in a voluntary government program, and enforced only contractually, raises different concerns. In such cases the "traditional" analysis (called the unconstitutional conditions doctrine) focuses on whether the agreement was truly voluntary, and on whether the condition is reasonable and germane to the purposes of the program. The recruiting rule defines a core value of this program, and is eminently reasonable. Brentwood cannot cite a single case in which this Court has invalidated a voluntary restriction on private concern speech that a state reasonably concludes poses a danger of harm to minors.

Brentwood contends that it was deprived of contractual

rights without due process, but it is free to invoke the ordinary "process" due for such harms: a state law action for breach of contract. Nothing about this context requires pre-deprivation "process" at all, but the hearing Brentwood received satisfies what this Court has required before firing a tenured public employee. It is entitled to no more.

This Court can correct the Sixth Circuit's particular errors here, but that is a limited solution. The only way to spare litigants and the federal courts from perpetual litigation over issues nowhere in the vicinity of core constitutional concerns is to hold that voluntary associations like TSSAA do not engage in state action when they enforce mutually agreed-upon game rules.[1]

1. Brentwood and its *amici* argue that the athletic recruiting limitations voluntarily adopted by educators in every state are a threat to "school choice" or to the flow of information from schools to students and parents, necessary to marketplace competition. This is dangerous nonsense.

First, they argue as if athletic recruiting cannot harm students unless it involves coercion or outright bribery. But recruiting impressionable children specifically for athletic purposes inherently threatens to distort their developing values, and sends an improper message about the relative place of athletics in secondary education. Educators in this country face enormous challenges created by a popular culture that glorifies athletic over academic achievement, and unrealistically encourages young people to believe that professional sports are a viable mainstream career path. Educators are entitled to conclude that *their own schools* should not reinforce these myths. Recruiting rules also help protect the purposes and safety of high school athletics by

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[1] Brentwood wrongly suggests that the state action issue "is not properly before the Court." Resp. Br. 22 n.23. That issue is literally within Petitioner's Question Presented, and was argued in the Petition. Brentwood itself briefed the state action issue in its Opposition, did not challenge the propriety of addressing it, S. Ct. R. 15.2, and even identified it as the very first issue before this Court. Opp. at i.

minimizing dispiriting and dangerous lopsided contests. High school students vary widely in size and athletic ability. A school that actively recruits for athletic talent could field a nearly semi-pro football team that could actively harm its competitors. Br. of Nat'l Sch. Bds. Ass'n at 19-21. Even if there is a place in American education for such practices, TSSAA and its members are entitled to conclude that they do not want to participate in competition on those terms.

Second, as Brentwood stipulated, its participation in TSSAA is entirely voluntary. JA 274. Its headmasters testified that the school did not join under "compulsion" (JA 449), and that it is free to leave TSSAA at any time (JA 445-46). Its brief further concedes that TSSAA "would have no authority over Brentwood if the school [had] not agreed to be bound by [its] rules and regulations." Resp. Br. 34. As this Court has already confirmed, "[n]o school is forced to join." *Brentwood Acad. v. TSSAA*, 531 U.S. 288, 291 (2001) ("*Brentwood I*"). And there are other options. Countless independent schools nationwide do not belong to the largest statewide athletic associations in their state. Brentwood's own expert witness, Michael Obel-Omia, testified that his school elects to play in an Independent School League in New England. CAJA 1509. In Tennessee, other Christian schools, like Brentwood, have formed a Christian League (JA 433); Brentwood already participates in separate lacrosse and swimming leagues (CAJA 813); and Brentwood has *chosen not to join TSSAA for its middle school programs*, and plays in the Harpeth Valley Athletic Conference instead.[2] Further, non-member schools are still able to play regular season games with TSSAA members. TSSAA's executive director testified without contradiction that, but for one exceptional circumstance, TSSAA has "never declined" to allow its members to play nonmembers. CAJA 880; *see also* JA 450-51 (Brentwood headmaster confirms that TSSAA schools play nonmembers). As this Court noted in *NCAA v. Tarkanian*, 488 U.S. 179, 198 n.19

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[2] *See* http://www.brentwoodacademy.com/page.cfm?p=25.

(1988), leaving the NCAA would have been a blow to UNLV's vision of athletic glory, "[b]ut that UNLV's options were unpalatable does not mean that they were nonexistent." All Brentwood would have to give up here is the chance to win *TSSAA* tournaments.

Third, this rule does not deprive Brentwood of its ability to "tell its story" or inform students and parents about what it has to offer. TSSAA's recruiting rule applies *only* to the use of "undue influence" to secure or retain students "for athletic purposes." CAJA 988, 1267; Tr. 2202-06. *Amici* claim to be concerned that *any* contact with a prospective student, even if purely about academic or artistic programs, could be considered a violation. That is inconsistent with the plain text of the rule, and they do not point to any instance of such application. *This* communication was from the football coach, about football practice.[3] And even when it comes to athletics, the Sixth Circuit expressly held that it "does not mean, however, that Brentwood has no other outlet for providing such [athletic] information to prospective students, or that middle school students have no way of ... learning about their educational options." Pet. App. 11a. It found "numerous ways in which Brentwood can get its message about athletics out to prospective students," and listed several options. *Id.* at 11a-12a; JA 257 (Carter letter with similar options). Brentwood could send its message through open houses, meetings at other schools, and myriad diversity outreach programs. CAJA 2185-90. It had no difficulty getting its message out as a TSSAA member, and having outstanding football teams, for 25 years before this incident. It already had a system in place to send out packets to the families of students who had signed enrollment contracts, including information about athletic

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[3] Brentwood's current headmaster confirmed that the spring practice letter "certainly ... has an athletic purpose." CAJA 1402. Its former headmaster conceded the letter was "only" about "football." CAJA 634. And Ronnie Carter testified that while specific intent to violate the rule is not required, he does look to the context to determine whether the conduct has an athletic purpose. Tr. 1531-33.

schedules, CAJA 549-50, and that was perfectly permissible under the rule, CAJA 705 ("they could also have sent the information out at the time of acceptance ... [i]n a packet"). Brentwood's headmaster was asked "when you're talking about defending the school or right to tell its story ... that's not the spring practice letter and phone calls, is it?"; he responded "[n]o, sir." CAJA 633-34.[4]

Brentwood and its *amici* complain that even though the recruiting rule and guidance leave *schools* free to communicate in any number of ways, they impose more restrictive limits on *coaches*. There is no good reason why a school's direct recruiting ambassador has to be a coach, and there is no good reason why recruits need to be discussing financial aid with the football coach rather than the financial aid office. These are reasonable prophylactic attempts to curb obvious opportunities for abuse. And the suggestion by *amici* that athletic recruiting is the only effective way to reach underprivileged and minority students is offensive.

Brentwood's rhetoric about school choice seeks to mask how unusual these communications were. As Brentwood admits, "undue influence" in athletic recruiting under TSSAA rules includes "exceeding what is appropriate or normal." Resp. Br. 10. Brentwood had never sent *anything* similar to this "spring practice letter" before, and it has never identified any example of any other school in Tennessee sending such a letter to students still enrolled at another school. Coach Flatt sent the letter despite his stated preference that Brentwood's own 8th graders generally *not* attend spring practice because they would be intimidated. CAJA 1168. Brentwood's headmaster testified that the letter and calls were so unusual he "would have thought" Coach Flatt should have asked TSSAA about their propriety in advance. CAJA 585. He did not.

This was a black-and-white violation of the guidance

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[4] A headmaster from Memphis testified that "the independent schools in Memphis have come together and made an agreement that they won't try to recruit each other's kids," aside from TSSAA rules. CAJA 1271.

accompanying the rule, which states that "a coach may not contact a student or his or her parents prior to his enrollment in the school." JA 181. Whatever the outer bounds of the recruiting rule, Brentwood was on notice that *this conduct* was prohibited. While application of the guidance of course requires consideration of the facts of each case, Ronnie Carter confirmed that TSSAA "look[s] to the guides in interpreting the rule," CAJA 717, and a Board of Control member agreed that the "questions and answers are there to help you understand the rule itself." CAJA 1115.

Under any standard, this letter was inappropriate. Brentwood's famous football coach, for the very first time, sent a letter in the spring solely to students then-enrolled in other middle schools, describing Brentwood's football team as "your" team, admonishing them that it would "definitely be to your advantage" to attend spring practice, inviting them to call him at home, and signed "Your Coach." JA 119. Several experts testified that there is great potential for abuse in coach communications with students enrolled at other schools. CAJA 1744, 1749, 1544, 1676; *see Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding rule limiting letters to accident victims in first 30 days even though many might not actually cause harm). Although those students had signed up to attend Brentwood the following year, Brentwood knew they were not yet "enrolled" as defined in TSSAA's bylaws—and hence undue influence in recruiting them to attend was still prohibited. Tr. 416. Every year 3 to 5 students sign enrollment contracts at Brentwood and do not attend, CAJA 563, and Brentwood acknowledges that some students sign multiple enrollment contracts, Tr. 2424. Several of the students receiving this letter were regarded as the leading athletes in the entire city, and one of them had been admitted to Brentwood the prior year but had declined to attend. JA 122; Tr. 284-93. The letter was so effective that every student who received it left the school they were attending to go to Brentwood's spring practice. Coach Flatt admitted that he realized some students would not view the letter as optional. JA 301-02. Although this

was ostensibly a football practice, Brentwood's varsity basketball coach met with two of the top athletes there. JA 133. Brentwood advertised that it took "athletic abilities" into account when allocating financial aid, JA 444, and Coach Flatt (who had previously engaged in the recruiting of fifth graders, Tr. 150-51) sat on the admissions and financial aid committees, CAJA 554. TSSAA stated that it was not the information in the letter that violated the rule, but the "manner" in which the entire affair was conducted. JA 241. The fact that attending spring practice was allowed at the time certainly does not make undue influence in recruiting kids to attend such practices harmless, or into nothing more than "informational" speech about a "lawful" activity.

2. Brentwood argues that its voluntary decision to join TSSAA and agree to its rules is irrelevant. But context always matters in First Amendment analysis. Whether Brentwood's agreement to abide by the "rules and decisions" of TSSAA, JA 230-31, is a "waiver" or simply a substantive constraint on the scope of its rights, that agreement is significant to the First Amendment analysis—just as in *Rust v. Sullivan*, 500 U.S. 173, 199 (1991), and *Snepp v. United States*, 444 U.S. 507, 510 (1980).

Brentwood has no persuasive response to this Court's cases holding that government may offer citizens a "reasonable choice" to participate in voluntary government programs, subject to conditions it thinks necessary to the administration of the program. Brentwood argues that *Rust* and *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), apply only to conditions on the expenditure of funds. Resp. Br. 37-39. As the United States points out, "there is no basis for distinguishing a cash 'subsidy' from other optional government benefits." U.S. Br. at 17; *see also* NSBA Br. at 6-9. Surely *Rust* would not have been different if Congress had opened *its own* family planning clinics and invited doctors to volunteer, subject to the condition that they not discuss abortion while doing so. Similarly, if TSSAA could "fund" someone else to run tournaments subject to the reasonable condition that participants not use undue

influence to recruit for athletic purposes, then it can offer such tournaments itself subject to the same condition.

This Court also explained in *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996), that strict scrutiny would have applied "if the Board had exercised sovereign power against him as a citizen in response to his political speech," but that "in this case, as in government employment cases, the Board exercised contractual power, and ... [d]eference is therefore due to the government's reasonable assessments of its interests *as contractor*." *See also Connick v. Myers*, 461 U.S. 138, 152 (1983) ("wide degree of deference" due to public employer's prediction of disruption). Brentwood's only response is that these cases are "altogether different" because it is not performing a service for TSSAA. Resp. Br. 40. That is not a meaningful distinction. TSSAA is offering a beneficial enterprise, in the form of organized competition. That endeavor requires rules, including some limits on the speech or speech-effectuated conduct of participants, such as unsportsmanlike behavior or recruiting. Any cooperative enterprise can work effectively only if the leadership has authority to take measures it reasonably believes to be necessary to the common good. "[O]rdinary dismissals from government service ... are not subject to judicial review" unless they genuinely involve an attempt "to suppress the rights of public employees to participate in public affairs" through "speech on matters of public concern." *Connick*, 461 U.S. at 146, 144-45. Ordinary dismissals from a government-sponsored voluntary *athletic league* are entitled to no greater solicitude. The fact that TSSAA delivers a benefit by organizing a sports league rather than by hiring persons to play in it changes nothing important to the analysis.

Brentwood's incantation that TSSAA is "regulating" athletics simply misses the central issues, which are the context of any "regulation" and the source of its authority. The NFL "regulates" football, and the NASD "regulates" securities dealers, with no constitutional scrutiny at all. Public employers "regulate" their workplace, and this Court

has applied very deferential standards. If TSSAA's rules were so unrelated to legitimate athletic or academic goals that insisting upon them as the price of playing would not present a "reasonable choice" to participants, then those rules would fail unconstitutional conditions analysis. But Brentwood cannot credibly contend that its voluntary choice is irrelevant to the First Amendment analysis.

3. Brentwood tries to defend that position by relying on a host of inapposite precedents. This Court has applied heightened scrutiny only if the government employs sovereign power through civil or criminal penalties, interferes with speech in a traditional public forum, or restricts or compels speech on matters of public concern through truly coercive "conditions" on government benefits.

First, Brentwood cites a number of cases in which this Court applied heightened scrutiny to restrictions that Brentwood mischaracterizes as voluntary. For example, it argues that the commission in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), had no prosecutorial power. Resp. Br. 24-25. But this Court found that "compliance with the Commission's directives was not voluntary," was "superimposed upon the State's criminal regulation of obscenity," and so coercive that it "obviat[ed] the need to employ criminal sanctions." 372 U.S. at 68-70. It relies on *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-32 (1943), which involved "a compulsion of students to declare a belief" upon pain of criminal penalties for the students and their parents. Brentwood cites the dissent in *Barnette* for the notion that attending public school is a choice, Resp. Br. 27, but that is not true for most families. Even if it were, all that means is that some choices, such as the "choice" to violate core religious beliefs, not to attend public school, or not to receive welfare benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963), may not be "reasonable."

Brentwood similarly relies on cases in which states have used sovereign power to prohibit persons from practicing a profession without a license and to punish inappropriate behavior by licensed professionals. *See Edenfield v. Fane*,

507 U.S. 761 (1993); *In re Primus*, 436 U.S. 412 (1978). Brentwood suggests that those cases are apt because the regulated parties had the option of giving up their career in order to avoid the regulation. That obviously is not a "reasonable choice," and nothing like the feeble dilemma facing Brentwood. It protests that the accountant in *Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136 (1994), could have performed some accounting functions without the license, but she could not hold herself out as a CPA or attest to the correctness of financial statements. *Id.* at 139. Brentwood also relies on *Legal Services Corp. v. Velazquez*, but this Court held that the condition imposed on participation was an attempt to "distort[] the legal system" and "insulate the Government's laws from judicial inquiry." 531 U.S. 533, 544, 546 (2001). A choice that fundamentally undermines the judicial system may not be "reasonable," but that does not help Brentwood. If this line of cases were applicable (it isn't), the appropriate analogy is *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978), which held that a state may adopt reasonable "prophylactic" measures to prevent and punish in-person solicitation by lawyers, where there is risk of exploitation and undue influence.

Second, Brentwood cites public forum cases. Resp. Br. 25-28. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), the theaters "were public forums designed for and dedicated to expressive activities." In *Board of Regents v. Southworth*, 529 U.S. 217, 229-30 (2000), the program's "sole purpose [was] facilitating the free and open exchange of ideas," and, as such, "public forum cases are instructive here by close analogy." This Court has recognized the special status of the university in our society such that "the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200. The same cannot be said of a sports league. And if "forum analysis" *were* appropriate here, TSSAA is clearly a nonpublic forum that may be limited by rules "reasonable in light of the purpose served by the forum."

Cornelius v. NAACP Legal Def. & Educational Fund, Inc., 473 U.S. 788, 806 (1985). That is, of course, very similar to unconstitutional conditions analysis.

Finally, Brentwood relies on *Keller v. State Bar*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). This is a bold gambit. *Keller* and *Abood* apply the unconstitutional conditions analysis that Brentwood rejects, and hold that even burdens on speech *coercively* imposed upon participants in a common enterprise may be constitutional (without regard to the heightened scrutiny Brentwood wants to invoke) if they are reasonable and germane to the purposes of the enterprise. In *Abood*, for example, this Court explained that the collective bargaining system necessarily subordinates individual interests to the "collective interests" of the group. 431 U.S. at 222-23. "'As long as [the group's leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'" *Id.* at 223 (citation omitted). The plaintiff had a valid claim to withhold his funds *only* with respect to "other ideological causes not germane to [the union's] duties as collective-bargaining representative." *Id.* at 235. That "germaneness" inquiry resolves this case in TSSAA's favor. *See* TSSAA Cert. Reply at 5-6.

4. Brentwood also argues that TSSAA's recruiting rule is vague or overbroad. Resp. Br. 44-47. Those arguments are not properly before this Court. The Sixth Circuit held only that the rule was unconstitutional as applied—and found that it "strains credulity" to claim this rule is vague or overbroad as applied to Brentwood's conduct. Pet. App. 21a. A "facial" vagueness or overbreadth finding, invalidating the rule in all cases, would be a substantial alteration of the ruling below for which a cross-petition was required. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment ... cannot be presented unless a cross-petition has been filed."). Brentwood challenged the district court's refusal to enter an order invalidating the rule by cross-

appeal below, and lost. Pet. App. 130a-31a.

Regardless, the overbreadth doctrine "does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also United States v. Edge Broad. Co.*, 509 U.S. 418, 430-31 (1993) (commercial speech requires only "reasonable" fit between regulation and "general problem" targeted). Brentwood's "school choice" arguments confirm that its recruiting efforts seek to solicit "customers" for a "commercial transaction" with the school. CAJA 1417-22; *see Ohralik*, 436 U.S. at 455 (rules against in-person solicitation to prevent undue influence regulate only commercial speech); *cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) ("[A] proposal of possible employment" is a "classic example[] of commercial speech.").

A rule against "undue influence" in recruiting particular students "for athletic purposes" also is not substantially overbroad "judged in relation to [its] plainly legitimate sweep." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). Prior to this litigation, Brentwood never complained that the rule was unworkable, CAJA 894-95, and it has not cited a single instance of it being applied inappropriately. *Cf. N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14 (1988) ("[A]ppellant must demonstrate from the text of [the law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally."). Brentwood and its *amici* argue for vagueness only by suggesting that TSSAA *might* enforce the rule in a manner inconsistent with its text (such as recruiting students for purely academic purposes). But "hypertechnical theories as to what the statute covers" and "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000). The cases Brentwood and its *amici* cite involve prior restraints imposed without any guiding standards or opportunity for review. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-

31 (1992); *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). There is no prior restraint here, there are real constraints on discretion, Pet. App. 20a, and any decision can be challenged through robust process. Since TSSAA does not have "unfettered discretion to deny [Brentwood's ability to speak] altogether," this case does not fall "within the narrow class of permissible facial challenges." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). And cases involving criminal penalties are inapposite. *E.g.*, *Houston v. Hill*, 482 U.S. 451 (1987). Moreover, when the government is articulating limits on voluntary or contractual programs, this Court has applied an entirely different approach. In *NEA v. Finley*, 524 U.S. 569, 588 (1998), this Court upheld a statute considering "decency and respect for the diverse beliefs and values of the American public" in awarding grant money. The statute was "undeniably opaque," but when the government is not acting as sovereign, "the consequences of imprecision are not constitutionally severe." And in *Waters v. Churchill*, 511 U.S. 661, 673 (1994), this Court confirmed that "a public employer may ... prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."

The rules of a sports league require use of concepts like "unsportsmanlike conduct" or "undue influence," the application of which in a particular case may be debatable. *Ward*, 491 U.S. at 794 ("perfect clarity and precise guidance have never been required"); *Hill*, 530 U.S. at 733. Voluntary organizations often articulate values that define the very identity of the group. Applying those ideals will involve the exercise of judgment (what Brentwood calls "ad hoc"), but the member's recourse is that that judgment will be exercised by its peers to vindicate collective goals. The decision that Brentwood's conduct crossed the line was made by a panel of educators elected by all the members.

That point also answers the suggestion that the recruiting rule somehow infringes the right of students or parents to *receive* information. If a voluntary fan club decides that its members will support only the Red Sox, that

will affect the discourse heard by others. But no one has a right to remain a member of that organization while openly cheering for the Yankees, and no outsider can complain that the voluntary self-restraint of members is limiting what they hear. Brentwood seeks nothing less than a right to change the nature of TSSAA, and conscript the other members into participating in a manner inconsistent with their values. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 (2000). And a ruling for it would create two separate constitutional regimes for TSSAA's members. If a public school coach had sent the spring practice letter to an 8th grader at Brentwood, he unquestionably could be fired, and the school sanctioned, with no First Amendment scrutiny.

5. The radical implications of Brentwood's position are best illustrated by its argument (and that of *amici*) that the recruiting rule is an attempt to suppress speech with particular content, subject to *strict* scrutiny. This rule does not prohibit discussion of any topic (or viewpoint), but merely the manner in which any message is delivered. It is facially directed at harmful *conduct* ("undue influence" in recruiting "for athletic purposes"), not speech.[5] And the speech affected is commercial solicitation of customers.

But if strict scrutiny *were* the result of analyzing this rule like a coercive law restricting the speech content of unconsenting citizens, that would illustrate why Brentwood's approach cannot be right. Brentwood would apply strict scrutiny (and rigorous vagueness and overbreadth standards) to a referee ejecting a player for speech evidencing "unsportsmanlike conduct," to a decision that a coach's promise of generous financial aid crossed the line into inducement, to a debate club's expulsion of a member who insists on proselytizing instead of debating the assigned topic, or to a bar association's decision that an

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[5] "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language ....'" *Ohralik*, 436 U.S. at 456 (citation omitted).

attorney exerted undue influence when soliciting clients.

6. TSSAA's interest in competitive equity has nothing to do with protecting the public schools, or subordinating the interests of students to the association. As the NSBA explains, consistently lopsided competition threatens both the educational goals of high school athletics (because dispirited students will not play) and students' physical safety. Every athletic league in the nation has rules that promote balanced competition, from Pop Warner to the NFL. Even Brentwood's headmaster agreed that "a fair chance to compete" and a "fair and even playing field" are important goals. JA 451. Brentwood's *amici* betray their own values by suggesting that the students TSSAA is trying to serve would learn more about "real life" by suffering through hopeless and physically dangerous mismatches. TSSAA's members are entitled to disagree, and to organize a league consistent with their objectives.

The "feeder pattern" commentary just recognizes that when a clear feeder pattern exists some contacts between the high school coach and the middle school students will be "normal and appropriate" by-products of joint activities and less likely to be, or to be perceived by students as, athletic recruiting. Tr. 2184. By analogy, contacts between Brentwood's coaches and middle-schoolers in its own captive feeder (Brentwood itself) are much less likely to be harmful than deliberate contacts with students at a school across town. Brentwood cites testimony that the range of permissible conduct is somewhat broader in the feeder pattern but no witness testified that the spring practice letter would have been permissible. To the contrary, as TSSAA's Executive Director testified, plenty of conduct targeting students violates the rule "whether it's in the feeder pattern or not," CAJA 698-99, and both he and a Board of Control member explicitly testified that *this* letter would have been considered a violation of the rule even if sent within a "feeder pattern." CAJA 991, 1295.

7. If Brentwood has any "property interest," it is a contractual entitlement. Where a plaintiff's interest "can be

fully protected by an ordinary breach-of-contract suit," then so long as the state "makes ordinary judicial process available to [the plaintiff] for resolving its contractual disputes, that process is due process." *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196-97 (2001); *see also Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (tort lawsuit is due process); *cf. Waters*, 511 U.S. at 679 (employee may be able to challenge employer's conclusions under state contract law). In *Lujan* the state decided that a contractor had not complied with a clause in its contract, imposed a fine, and withheld the fine from payments earned and due. This Court held that the option of suing for breach was sufficient. Brentwood too is free to sue under state law—for breach, for arbitrary action, or for a failure by TSSAA to follow its own rules.[6] TSSAA imposed a $3,000 fine but Brentwood has never paid it, and hence faced less immediate hardship than the plaintiff in *Lujan*. Even if the prospective playoff suspension infringed a property interest (which the Sixth Circuit declined to decide), Brentwood had time to seek preliminary injunctive relief in state court. And its main complaint is that it did not receive adequate "notice," but its notice rights are contractual and redressable in a contract action. The Sixth Circuit thus erred by using § 1983 to assess whether it *actually* received the required notice. To the extent aspects of TSSAA's decision (such as its exercise of discretion) would not be reviewed *de novo* in a state law challenge, that is because Brentwood agreed to be bound by a process very much like arbitration. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991) (rejecting due process challenge to arbitration award).

The combination of the available state remedies and the procedures TSSAA provided certainly satisfy due process.

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[6] *See, e.g., Cohn v. Baker*, 2006 Tenn. App. LEXIS 638, at *18 (Tenn. Ct. App. 2006) (state court will review internal decisions of association if it "acted contrary to its own policy or in an arbitrary or capricious manner"); *Coke v. United Transp. Union*, 552 S.W.2d 402, 405 (Tenn. Ct. App. 1977) (same); *TSSAA v. Cox*, 425 S.W.2d 597, 601 (Tenn. 1968) (review available if there is an "invasion of property rights or interests").

Brentwood is wrong that it was denied "'an explanation of [TSSAA's] evidence, and an opportunity to present [its] side of the story,'" Resp. Br. 48 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). It received ample explanation and opportunity. Brentwood's actual claim is that *Goldberg v. Kelly*, 397 U.S. 254 (1970), requires a full on-the-record hearing at which TSSAA proves its case, subject to formal cross-examination, and that the decision be based only on evidence "adduced at the hearing," before a previously uninvolved decisionmaker. But due process can vary based on the competing interests, and usually "something less than an evidentiary hearing is sufficient." *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976). This Court has approved procedures like the ones used here in every case but *Goldberg* itself, including those involving the firing of tenured public employees, *Loudermill*, the firing of employees for disruptive speech, *Waters*, academic expulsions, *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1977), and student disciplinary suspensions, *Goss v. Lopez*, 419 U.S. 565 (1975). Brentwood was afforded an opportunity to respond in writing and at two extensive hearings. Its complaints about "*ex parte* evidence" are just an indirect way of claiming that it was improper for the decisionmakers to consider anything other than what was presented at the hearing—and that therefore TSSAA should have been required to prove *its* "case" before decisionmakers with no prior knowledge. Even the Sixth Circuit understood that Brentwood was entitled to no such thing. The appropriate procedures are "shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions," *Mathews*, 424 U.S. at 344, and marginal gains from added process may be outweighed by the costs and harm to institutional interests, *id.* at 348. TSSAA needs to be able to interact with members, and members need to feel comfortable reporting issues, without the cloud of future cross-examination hanging over each conversation. And it would be unduly burdensome to force TSSAA to employ an independent adjudicatory operation.

8. Brentwood's due process complaints are also contradicted by undisputed facts of record.

First, there is nothing in the investigators' notes that was not specifically communicated to Brentwood in Carter's July 3, 1997 letter, and Brentwood has never claimed otherwise. *Compare* CAJA 4178-93 *with* JA 204-11. Nor has it identified any other "evidence" allegedly discussed at deliberations of which it lacked notice.

Second, Brentwood now argues that it had no notice that the King allegations remained at issue. But Carter's July 29 decision letter ruled Curry ineligible, and Brentwood does not even attempt to rebut TSSAA's explanation (undeniable on this record) that all of the allegations involving Curry centered around contacts with King. Pet. Br. 42-45. Tom Nebel, Brentwood's attorney at the two hearings, testified that he "knew that TSSAA was concerned about Mr. Bart King" before going into the August 13th hearing. Tr. 1491. After the August 13 hearing, Curry remained ineligible due to King's contacts. And, as TSSAA explained (Pet. Br. 44) without any rebuttal, Curry's testimony at the August 23 hearing was entirely in response to the King allegations.

Third, at the August 23 hearing, Brentwood replied to every allegation considered by TSSAA, including the King charges. It submitted King's affidavit (and the Board reviewed it, JA 269), which responds to every allegation in the July 3 letter (and, accordingly, to every allegation in the investigators' notes). It presented Curry's statement and live testimony. It would not have submitted this evidence if it had no notice that the Board might consider the King matters. Despite not calling King to the stand (because it had used all of its allotted time, JA 267), Nebel testified he was not prevented from presenting any evidence he wished at the hearings. JA 396-401.

9. This Court's conclusion that TSSAA engaged in state action when enforcing the recruiting rule against Brentwood should be reconsidered. *Brentwood I* departed from this Court's traditional focus on "the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991,

1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (no state action in discharge of employees because despite "extensive [state] regulation ... generally, the various regulators showed relatively little interest in the school's personnel matters"); Br. of NCAA at 10-12. Instead, it looked principally to the "structure of the association," and whether the state "can sensibly be seen" as "entwined" in it.

The unworkability of that approach is apparent from the trial in this case, which allowed Brentwood to argue simultaneously that TSSAA's specific conduct here is—and is not—attributable to the state, burdening TSSAA with all of the obligations of a state actor while denying it the benefits. After *Brentwood I*, TSSAA moved to dismiss Brentwood's antitrust claims based on state action antitrust immunity. *Parker v. Brown*, 317 U.S. 341 (1943) (sovereign conduct immune under Sherman Act). The standards under the Fourteenth Amendment and for immunity are not identical, but they pose many of the same *factual* questions, and "[i]n both contexts ... courts examine whether the rule ... is a rule of the State." *Tarkanian*, 488 U.S. at 194 n.14.

Antitrust immunity requires a "clearly articulated and affirmatively expressed state policy." *Hoover v. Ronwin*, 466 U.S. 558, 568-69 (1984). To defeat immunity, Brentwood argued that "[n]o such imprimatur of the state as sovereign exists here," that "[n]o legislation recognizes TSSAA, so no 'clear articulation' by Tennessee 'as sovereign' exists from that source," and that the Board of Education "does not actively supervise the development of rules and regulations by the TSSAA." Br. of Brentwood Acad., Sixth Circuit Nos. 03-5245/5278 (June 8, 2004), at 62, 64 (citation omitted). In short, it argued that the specific conduct at issue here was not coerced or encouraged by the state, and urged liability on the premise that TSSAA acted, at most, with the acquiescence of the state.[7] Brentwood similarly defeated

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[7] Brentwood's only response to its factually inconsistent arguments has been to "admit[] that the above-referenced statement was made for the sole purpose of establishing that Defendants are 'state actors' ... [but]

qualified immunity for Carter in the trial court by arguing that the state does not participate in or endorse TSSAA's enforcement of the recruiting rule. Tr. 14-18, 1832-33, 2910. These contentions would have ended its constitutional claims under the traditional rule that there is no state action in the "absence of any allegation that the [challenged] decision was itself based upon some rule of conduct or policy put forth by the State." *Rendell-Baker*, 457 U.S. at 844 (White, J.). Even the *Blum dissent* argued that only "when the State directs, supports, and encourages [private] parties *to take specific action*, that is state action," 457 U.S. at 1028 (emphasis added) (Brennan, J., dissenting).

Entwinement is also unworkable because it undermines this Court's previous assumption that state action is also action under color of law. "Where the issue is whether a *private* party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by ... standards ... not established by the State." *West v. Atkins*, 487 U.S. 42, 52 n.10 (1988). Even if TSSAA could be deemed a state actor due to its structural "entwinement" for some purposes, it does not act under color of law when it promulgates or enforces mutually agreed-upon rules that the state never coerced or encouraged. Pet. Br. at 48-49. And, even if the state authorized TSSAA to "regulate" athletic competition among its public schools in some sense, and even if public school officials are entwined with TSSAA, TSSAA did not exercise power "possessed by virtue of state law," *West*, 487 U.S. at 49, or bring any force of the State to bear against *private* schools. TSSAA's only authority over Brentwood derives from Brentwood itself. Resp. Br. 34.

CONCLUSION

The judgment of the court of appeals should be reversed, and this Court should direct the entry of judgment in favor of TSSAA on the First Amendment and Due Process claims.

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that any such statement was not made in conjunction with its federal antitrust claims in this case." CAJA 287-99.

Respectfully submitted,

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